HIGH COURT OF AUSTRALIA

Roberts

Vs.

Ahern

(Griffith, C.J., Barton and O'Connor, JJ.)

10th August 1904

Griffith, C.J.

This is an appeal from a conviction made by the Court of Petty Sessions at Inglewood upon a complaint preferred by the respondent, who is inspector of nuisances of that Borough, charging the defendant "that on 25th March, 1904, he carted away nightsoil without a licence from, and without having given any such security as is required by, the local authority, contrary to the Act in such case made and provided." The Statute in question is the Victorian *Police Offences Act 1890* (No. 1126). Sec. 5 of that Act enacts that "Any person guilty of any of the following offences omissions or neglects shall on conviction pay a penalty not exceeding £20... (vii.) Emptying any privy or cesspit or carting away any nightsoil or other offensive matter without a licence from and without having given such security as is required by the local authority." The term "local authority" in the case of a borough means the council of the borough. At the hearing of the complaint it was proved that the appellant had done the act alleged for the purpose of discharging sanitary duties in connection with the post office at Inglewood. It is stated in the depositions that on being called on for his defence, he said that he was authorized by the Commonwealth Government, through the postmaster, to remove nightsoil from the post office, and asked for an adjournment to enable him to obtain professional assistance. The adjournment was refused, and the appellant was convicted and fined. It appears that by the Victorian law the statement of the defendant (the truth of which is not denied) may be regarded as evidence given on his behalf. The defence set up was evidently treated as one raising an untenable point of law, and an appeal would clearly lie from a decision over-ruling it. Special leave to appeal was granted by this Court. The decision was, however, a decision given in the exercise of jurisdiction conferred by sec. 39 of the *Judiciary Act*, from which an appeal lies to the High Court as of right. The leave, therefore, which was asked for *ex abundanti cautelâ*, must not be regarded as a precedent for holding that the Court can, or, if it can, will, grant special leave to appeal from a decision of an inferior Court of a State given otherwise than in the exercise of federal jurisdiction.

The appeal was brought on the ground that the enactment in question does not extend to control the operations of the Executive Government of the Commonwealth. In support of this contention various points were raised and discussed before us, but in the view that we take of the matter it is not necessary to consider more than one of them, namely, whether sec. 5 of the *Victorian Police Offences Act*, when it was passed, bound the Executive Government of Victoria. It is not disputed that, if it did not bind the Victorian Government, it does not now bind the Federal Government, to which the rights and obligations of that Government in respect of the Post and Telegraph Department have been transferred.

It is a general rule that the Crown is not bound by a Statute unless it appears on the face of the

Statute that it was intended that the Crown should be bound by it. This rule has commonly been based on the Royal prerogative. Perhaps, however, having regard to modern developments of constitutional law, a more satisfactory basis is to be found in the words of *Alderson*, B., delivering the judgment of the Court of Exchequer in *A.-G. v. Donaldson*, 10 M. & W., 117, at p. 124: "It is a well established rule, generally speaking, in the construction of Acts of Parliament that the King is not included unless there be words to that effect; for it is inferred primâ facie that the law made by the Crown with the assent of Lords and Commons is made for subjects and not for the Crown." The modern sense of the rule, at any rate, is that the Executive Government of the State is not bound by Statute unless that intention is apparent. The doctrine is well settled in this sense in the United States of America. In the language of *Story*, J.: "Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischief to be redressed, or the language used, that the Government itself was in contemplation of the legislature, before a court of law would be authorized to put such a construction upon any Statute. In general, Acts of the legislature are meant to regulate and direct the acts and rights of citizens, and in most cases the meaning applicable to them applies with very different and often contrary force to the Government itself. It appears to me, therefore, to be a safe rule founded on the principles of the common law that the general words of a Statute ought not to include the government unless that construction be clear and indisputable upon the text of the Act." *United States v. Hoar*, 2 Mason (U.S. Circuit Court), 311.

With regard to the Statute now under consideration, so far from its text suggesting a clear intention to control the action of the Executive Government a contrary intention is, *primâ facie*, more probable. At the time when the Act was passed the Executive Government had the control of many great institutions, gaols, orphanages, asylums, police barracks, government departments of all sorts, and occasionally military encampments, and it is *primâ facie* unlikely that the legislature should have intended to subject the Executive Government to the uncontrolled discretion of a local authority with regard to the sanitary arrangements of such institutions. Such a construction would have rendered the executive officers of the State themselves liable to prosecution whenever they procured any such act to be done without the license of the local authority or without giving security to its satisfaction. Moreover, the provision in question is contained in Part I. of the Statute, which is headed "Police Provisions applicable to Special Localities," and is only to be brought into force by proclamation (sec. 4), although the whole of Part I. was by another Statute of the same year made applicable to Boroughs. The cases of *Cooper v. Hawkins*, (1904) 2 K.B., 164; *Gorton Local Board v. Prison Commissioners*, *ibid.*, 165*n*; and *Gomm v. Bennett*, 21 V.L.R., 608*n*; 16 A.L.T., 223, lead to the same conclusion. In our judgment, therefore, the provision in question did not affect the Victorian Government and does not now affect the Federal Government or its agencies in the management of the Post and Telegraph Department. This point indeed, was not very seriously contested by Mr. Isaacs, who rested his argument in support of the conviction mainly upon the contention that the immunity of the Executive Government only extends to persons who stand to it in the direct and immediate relation of servants, and does not afford any protection to persons who stand in the relation of contractors for service, or at any rate, not to the servants of such contractors. The exact facts as to the appellant's employment were not ascertained before the Court below, but it appears from an affidavit filed on behalf of the appellant that what he actually said in defence was: "I was employed by one Appleby, who has a contract with the Commonwealth, and I was acting as his servant on behalf of the Commonwealth, through the postmaster." Taking the fact to be as so stated, Mr. Isaacs relied upon the case of *Dixon v. London Small Arms Co.*, 1 App. Cas., 632, as establishing the rule for which he contended. But on examination we do not think that it establishes or involves any such rule. The appellant in that case was the holder of certain patents for

improvements in the manufacture of small arms. The respondents were contractors for the manufacture and supply of small arms for the use of His Majesty, and in the course of the manufacture they made use of the appellant's patents. It was not disputed that the Crown was itself entitled to use the patents, but the question was whether, under the circumstances, the defendants could take advantage of the Crown rights. As pointed out by Lord *Penzance* (p. 651), the real question in the case was whether, under the circumstances, the contract which was made between the respondents and the Government was a contract of agency, or a contract of sale. All the learned Lords considered the matter from that point of view, and came to the conclusion that the contract was one of sale, and not of agency, and that the respondents were not therefore entitled to the benefits which they would have had if the contract had been one of service or agency. Lord *Selborne* said (p. 660):

The case, therefore, in my opinion, depends upon the question whether the relation of master and servant, or of principal and agent, existed between the Crown and these respondents during the process of the manufacture of the breech action in question, and for the purposes of that manufacture; and this question must, in my opinion, be decided by a strict and accurate application of legal principles to this particular contract, exactly in the same manner as if any private person, and not a public department, had contracted with the respondents in the terms of the documents before us for the supply of these arms.

I cannot doubt as to the answer to be given to the question when that test is applied. There is clearly no contract of hiring and service, and I am equally clear that any private persons who entered into such a contract would not have been liable for the acts of the defendants during the process of manufacture, as a principal is liable for the acts of his agent. It is not like the case of a railway contractor who executes work which the company itself is bound by law to execute, and which can only be executed by the directors, or by some person acting by their authority, and entitled on their behalf to exercise the powers vested in them by the legislature.

Applying the same principle to the present case, it appears to us that the relation of principal and agent existed between the Commonwealth Government and Appleby and his servants, in the discharge of the duties in question, and that the mode of their remuneration and the terms of their employment are immaterial. When an act unlawful at common law is made lawful by Statute, it is clear that the authorization extends to the protection of all persons and agencies employed in doing the act, and it is immaterial whether the persons are so employed under a contract or stand in the direct relationship of servants to the persons who have the statutory authority. Of this rule, *Newton v. Ellis*[1855] EngR 487; [1855] EngR 487; , 5 E. & B., 115; 24 L.J.Q.B., 337, affords a good illustration. Nor can it make any difference whether the act in question is one which, being unlawful at common law, is made lawful by Statute, or is one which, being lawful at common law, is not made unlawful by any Statute. The case of *Black v. Christchurch Finance Co.*, (1894) A.C., 48, is authority, if authority be needed, for the proposition that the liability of the principal for the acts of his agent is not excluded by the fact that the agent is a contractor, or himself works by sub-agents. The terms of the employment must be the subject of inquiry to the extent of ascertaining that the relation of service or agency exists in fact, but in our judgment the Executive Government cannot be controlled either in its choice of agents or in the form of their appointment or mode of their remuneration. Nor, in our judgment, is it material whether the appointed agent does the work with his own hands, or through the medium of his servant. For these reasons we think that the appeal must be allowed.

Appeal allowed with costs.

Solicitor, for appellant, Powers, Commonwealth Crown Solicitor.

Solicitor, for respondent, Pyman, Melbourne.

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